TAN THEAN CHOOI

v.

KUWAIT FINANCE HOUSE (MALAYSIA) BHD & ANOTHER CASE

HIGH COURT MALAYA, PULAU PINANG
MOHD AMIN FIRDAUS JC
[BANKRUPTCIES NO: 29-1806-11-2012 & 29-1807-06-2012]
14 JUNE 2013

BANKRUPTCY: *Notice - Setting aside - Application for - Calculation of judgment sum in bankruptcy notice - Whether ought to be quantified up to date of issue of bankruptcy notice - Whether 'interest' in s. 3(1)(i) Bankruptcy Act 1967 applicable to final judgment arising from Islamic banking facilities - Whether notice valid - Bankruptcy Rules 1969, r. 66 - Rules of the High Court 1980, O. 13 r. 1(1)*

BANKRUPTCY: *Notice - Setting aside - Application for - Judgment creditor obtained judgment in default of appearance - Whether judgment final - Whether judgment debtor failed to prove existence of counterclaim, set-off or cross-demand - Rules of the High Court 1980, O. 13 r. 1(1) - Bankruptcy Rules 1969, r. 66 - Bankruptcy Act 1967, s. 3(1)(i)*

BANKRUPTCY: *Notice - Setting aside - Application for - Service - Service of notice on Saturday - Whether bad service - Whether in violation of r. 66, Bankruptcy Rules 1969 - Rules of the High Court 1980, O. 13 r. 1(1) - Bankruptcy Act 1967, s. 3(1)(i)*

The judgment creditor ('JC') had, on 29 March 2012, obtained judgment against the judgment debtors ('JD'). Both the JD's application to set aside the bankruptcy notices dated 8 June 2012 against them was, however, dismissed by the Senior Assistant Registrar. Thus, the JD appealed. It was the JD's argument that the calculation of the judgment sum as shown in the bankruptcy notice was only quantified up to 30 April 2012 thereby contravening s. 3(1)(i) of the Bankruptcy Act 1967 ('the Act') which stated that it ought to be quantified up to the date of issue of the bankruptcy notice. The issues that arose herein were (i) whether the word 'interest' stated in s. 3(1) of the Act was applicable to a final judgment arising from Islamic banking facilities as in these present cases; (ii) whether the serving of the

bankruptcy notice on the JD on a Saturday was valid; (iii) whether the JD had a counterclaim, set-off or cross-demand against the JC; and (iv) whether the judgment obtained was a final judgment.

Held (dismissing JD's application with costs):

(1) The Bankruptcy Act 1967 does not contain any provision whatsoever in relation to Islamic banking, especially a judgment sum based on *Murabahah Tawarruq* facility. Thus, there was a *lacuna* in the Act. It is for the Legislature to look into the *lacuna* and not this court. In consequence of this *lacuna*, 'interest' in s. 3(1)(i) of the Act ought not to be interpreted to include late payment compensation in relation to Islamic banking facilities. In the circumstances, the JC was not obliged to quantify the late payment compensation up to the date of issue of the bankruptcy notice. Therefore, the bankruptcy sums which were only quantified up to 30 April 2012 and not up to the date of issue of the bankruptcy notice on 8 June 2012 was valid. (paras 22-27)

(2) Serving the bankruptcy notice on a Saturday did not violate r. 66 of the Bankruptcy Rules 1969 (*Dato' Hj Yusuf Kamari v. CIMB Bank Bhd*, refd). Hence, it was not bad service. Further, under O. 13 r. 1(1) of the Rules of the High Court 1980, the JC had obtained a final judgment in default of appearance (*Adzmi Ali & Anor v. Mohamed Isa Kasad*, refd; *Re Tan Hwee Earn, Ex P the People's Insurance Company (M) Sdn Bhd*, refd). (paras 28-31)

(3) The JD had merely claimed he had a counterclaim, set-off or cross-demand against the JC without condescending to particulars of the same. Upon the cited authorities of *Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan* and *Insurance Sdn Bhd v. Koh Tian Bee*, the JD had failed to prove that he had a counterclaim, set-off or cross-demand. (paras 32 & 36)

Case(s) referred to:

Adzmi Ali & Anor v. Mohd Isa Kasad [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 SC ***(refd)***

Dato' Hj Yusuf Kamari v. CIMB Bank Bhd [2009] 9 CLJ 209 HC ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***

Lim Boon Peng v. United Orient Leasing Co Bhd [1991] 1 CLJ 445; [1991] 1 CLJ (Rep) 270 SC ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam [1993] 3 CLJ 349 SC ***(refd)***
Ratna Ammal v. Tan Chow Soo [1970] 1 LNS 131 FC ***(refd)***
Re Sia Teck Yong; Ex P Bank Bumiputra Malaysia Bhd [1996] 1 LNS 356 HC ***(refd)***
Re Tan Hwee Earn, Ex P the People's Insurance Company (M) Sdn Bhd [1999] 4 CLJ 325 HC ***(refd)***
Re Undoh Asai; Ex Parte Kewangan Bumiputra Berhad (Now known as BBMB Kewangan Berhad) [1995] 1 LNS 205 HC ***(refd)***
Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Bankruptcy Rules 1969, r. 66
Rules of the High Court 1980, O. 13 r. 1(1)

Other source(s) referred to:
GK Ganesan, *Bankruptcy Law in Malaysia and Singapore*, p 23

For the judgment creditor - EK Cheah; M/s Phee, Chen & Ung
For the judgment debtor - Heng Yee Keat; M/s Lee Ong & Kandiah

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Amin Firdaus JC:

Background Facts

[1] On 29 March 2012, the judgment creditor ('JC') obtained judgments against the judgment debtors ('JD') Tan Thean Chooi and Tan Boon Suan in the sum of RM37,067,719.94 in the High Court of Malaya at Kuala Lumpur *vide* Suit No: 22A-1174-11-2011 respectively.

[2] On 28 November 2012, the Senior Assistant Registrar in the High Court in Penang dismissed both the JD's applications (encl. 4 and encl. 22) to set aside the bankruptcy notices dated 8 June 2012 against them with cost of RM200 each.

[3] On 31 January 2013, this High Court upheld the decision of the Senior Assistant Registrar and dismissed the appeals (encl. 11 and encl. 15) filed by the two JD with costs of RM1,000 each.

Judgment Debtor

Argument

[4] The named JD Tan Thean Chooi basically put forward two main grounds to set aside the bankruptcy notice (encl. 11) as seen from the written submission filed by his former solicitor, CP Tang & Partners. The JD's present solicitor Phee, Chen & Ung did not submit any written submissions for him and for JD Tan Boon Suan. There is also no record to show that CP Tang & Partners had ever represented the other JD Tan Boon Suan and thus there is no written submission filed on his behalf.

Non-Compliance With s. 3(1)(i) Of The Bankruptcy Act 1967 ('Act 360')

[5] It was argued that the calculation of the judgment sum as shown in the bankruptcy notice was only quantified up to 30 April 2012 thereby contravening s. 3(1)(i) of Act 360 which stated that it ought to be quantified up to the date of issue of the bankruptcy notice.

[6] Learned counsel for the JD Tan Thean Chooi in his written submission cited *Re Undoh Asai; Ex Parte Kewangan Bumiputra Bhd* [1995] 1 LNS 205 (HC) and *Re Sia Teck Yong; Ex P Bank Bumiputra Malaysia Berhad (Now known as BBMB Kewangan Berhad)* [1996] 1 LNS 356; [1996] MLJU 597 (HC) to support his contention where both learned judges held that the words "with interest quantified up to the date of the issue of the bankruptcy notice" in s. 3(1)(i) of Act 360 means that effect must be given to it. Failure to do so renders the bankruptcy notice a nullity *ab initio*.

[7] The Supreme Court in *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172; [1988] 1 MLJ 263 (SC) held that the said words are clear and precise as bankruptcy is a creation of statute law, the rule of strict construction should be applied to the words in question, especially when bankruptcy

proceeding is quasi criminal in nature. It was further held that such non-compliance is not a defect in form and it renders the bankruptcy notice void *ab initio*.

Ambiguous Calculation

[8] The JD also contended that the calculation on p. 3 of the bankruptcy notice is ambiguous as it is impossible for the JD to determine whether the calculation is correct.

Other Grounds

Service of Bankruptcy Notice On A Saturday

[9] It was also argued that serving the bankruptcy notice on the JD on 23 June 2012 which was a Saturday is invalid.

Counterclaim, Set-Off Or Cross-Demand

[10] In trying to set aside the bankruptcy notice, the JD also said that he had a counterclaim, set-off or cross-demand against the JC.

Final Judgment

[11] The judgment obtained is not a final judgment.

Judgment Creditor

Argument

[12] Learned counsel for the JC contended that the bankruptcy sums for both judgment debtors quantified up to 30 April 2012 are valid. The bankruptcy sums were computed according to the terms of the judgments and calculated up to 30 April 2012.

[13] It was a further contention that the word "interest" stated in s. 3(1)(i) of the Bankruptcy Act 1967 is not applicable to the JC's case here.

[14] It was pointed out that the judgments were granted in relation to *Murabahah Tawarruq* Facility, that is Islamic Banking Facilities and therefore the JC is not entitled to claim for interest. The JC is only entitled to claim for 'ganti rugi bayaran lewat' (late payment compensation) and not interest. As such the JC is not claiming for interest.

[15] To sum up, the words "with interest" quantified up to the date of issue of the bankruptcy notice under s. 3(1)(i) of the Bankruptcy Act 1967 does not apply to the present two cases because the JC is not claiming for interest.

[16] The JC argued that in other words, the JC is not obliged to quantify the 'ganti rugi bayaran lewat' up to the date of issue of the bankruptcy notice.

[17] The JC cited the case in *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104; [2000] 3 MLJ 177 (CA), where the Court of Appeal held that when determining an issue under Act 360, it is necessary for the court to accord its provisions a strict construction.

[18] Thus, the JC contended that the word 'interest' in question stated in s. 3(1)(i) of Act 360 ought to be construed strictly and 'interest' should not be interpreted to include late payment compensation *vis-a-vis* the Islamic Banking Facilities.

Why Late Payment Compensation Was Calculated Up To 30 April 2012?

[19] At the time the bankruptcy notices were filed and issued in 8 June 2012, the JC's R-Rate was only available up to April 2012. At that time of filing, the JC's R-Rate for May 2012 was only known in mind June 2012 and the JC's R-Rate for June 2012 was only known in mid July 2012. Thus, the late payment compensation was calculated up to 30 April 2012 only.

[20] It follows that the bankruptcy sums which were quantified up to 30 April 2012 are the correct sums owing as at the date of filing the bankruptcy notices on 8 June 2012.

[21] The JC cited the case in *Lim Boon Peng v. United Orient Leasing Co Bhd* [1991] 1 CLJ 445; [1991] 1 CLJ (Rep) 270; [1991] 1 MLJ 292 (SC) where the Supreme Court held "... where it is not possible to quantify the maximum sum, it could not by itself render the bankruptcy notice bad in law for the simple reason that it could not possibly affect the correctness of the sum actually owing as at the date of issue of the bankruptcy notice".

Findings Of The Court

Issue

[22] Whether or not the word "interest" stated in s. 3 (1)(i) of the Bankruptcy Act 1967 (Act 360) is applicable to a final judgment arising from Islamic Banking Facilities as in these present cases?

[23] This court has scrutinised the whole Banking Act of 1967 and finds that it does not contain any provision whatsoever in relation to Islamic Banking, especially a judgment sum based on *Murabahah Tawarruq* Facility.

[24] Thus, there is a *lacuna* in the Banking Act 1967. It is for the legislature to look into the *lacuna* and not this court.

[25] In consequence of this *lacuna* this count is of the same view as the JC's learned counsel that 'interest' in s. 3 (1)(i) of Act 360 ought not to be interpreted to include late payment compensation in relation to Islamic Banking Facilities.

[26] In the circumstances, the JC was not obliged to quantify the 'ganti rugi bayaran lewat' (late payment compensation) up to the date of issue of the bankruptcy notice.

[27] Therefore the bankruptcy sums which were only quantified up to 30 April 2012 and not up to the date of issue of the bankruptcy notice on 8 June 2012 are valid.

Service Of The Bankruptcy Notice On Saturday

[28] On the authority of *Dato' Hj Yusuf Kamari v. CIMB Bank Bhd* [2009] 9 CLJ 209 (HC), this court rules that serving the bankruptcy notice on a Saturday does not violate r. 66 of the Bankruptcy Rules 1969. Hence, it was not a bad service.

Whether Or Not The Judgment Is A Final Judgment?

[29] The JC obtained a final judgment entered in default of appearance under O. 13 r. 1(1) of the Rules of the High Court 1980.

[30] In *Adzmi Ali & Anor v. Mohd Isa Kasad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37; [1987] 2 MLJ 199 (SC), the Supreme Court held:

> ... On the other hand, if the claim of the plaintiff is for a liquidated amount and the defendant defaults in entering an appearance within the specified time, final judgment for the sum claimed may be entered against him.

[31] In the case in *Re Tan Hwee Earn, Ex P the People's Insurance Company (M) Sdn Bhd* [1999] 4 CLJ 325; [1999] 4 MLJ 248 (HC), the High Court followed the *dictum* of the above Supreme Court case.

No Counterclaim, Set-Off Or Cross-Demand

[32] The JD merely claimed that he had a counterclaim, set-off or cross-demand against the JC without condescending to particulars of the same.

[33] "The counterclaim, set-off or cross-demand must be 'effective' at the time of the hearing of the application to set aside the bankruptcy notice and must be a liquidated sum or money ascertainable with certainty, as between the, same parties and in the same right", to quote the learned author GK Ganesan from his book *'Bankruptcy Law in Malaysia and Singapore'* Millennium edn. on p. 23. See *Ratna Ammal v. Tan Chow Soo* [1970] 1 LNS 131; [1971] 1 MLJ 277 (FC).

[34] The Federal Court case in *Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam* [1993] 3 CLJ 349; [1993] 2 MLJ 423 (FC), held that the burden of proof is on the defendant that the counterclaim must be capable of being quantified in terms of money and the affidavit must quantify it. Next, the counterclaim must be claimed in good faith and must have a reasonable probability of success. Lastly the affidavit must show that the counterclaim could not have been set up in the action in which the judgment relied upon by the creditor had been obtained.

[35] In *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277; [1988] 1 MLJ 304 (SC), the Supreme Court held that if the debtor claims a cross-demand, he must quantify it and satisfy the count that the demand is genuine and like a counterclaim, it has a reasonable chance of success.

[36] Upon these cited authorities, the JD Tan Thean Chooi has failed to prove that he has a counterclaim, set-off or cross-demand.

[37] Therefore this court dismissed the JD's application with costs. The court also dismissed JD Tan Boon Suan application based on the same authorities and same grounds.